No. 91-1589

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GEORGE SWAMP, JOHN HENDRICK, and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Petitioners,

vs.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, PETER R. DOHR and THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May a state, consistent with the First and Fourteenth Amendments to the United States Constitution, forbid a minor party to nominate a candidate for public office merely because that candidate is also the nominee of another political party?

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Petitioners,

vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

George Swamp, John Hendrick, and Labor-Farm Party/Partido Laborista-Agrario (collectively "petitioners" or "Labor Farm") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 950 F.2d 383 and appears as Appendix A ("App. A") to this petition. The opinion of the District Court for the Western District of Wisconsin, dismissing the lawsuit, is unreported and appears as Appendix B ("App. B"). The Court of Appeals' order denying petitioners' suggestion for rehearing *en banc*, and the written dissent to that order by Judge Ripple, joined by Judges Posner, and Easterbrook, are also unreported and appear as Appendix C ("App. C").

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 3, 1991. On February 11, 1992, three judges dissenting, the court of appeals denied petitioners' suggestion for rehearing *en banc*. Justice Stevens of this Court granted an extension of time for the filing of this petition to April 1, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and Wisconsin Statutes, §§ 8.15(7) and 8.03(1). Relevant portions of these constitutional provisions and statutes appear at Appendix D.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners ("Labor Farm") are a minor political party and two of its members. Labor Farm runs candidates for local and statewide office in Wisconsin. It has demonstrated sufficient voter support to qualify, along with the Republican and Democratic parties, as one of three "recognized" or "ballot status" parties in that state, with a line on statewide election ballots designated in its name (R6, Ex. A, ¶¶ 2-3).[1]

Labor Farm challenges the constitutionality of Wisconsin's blanket ban on "multiple party nomination" ("MPN"), or the nomination of a single candidate, in the same election and for the same office, by more than one party. In an MPN system, a candidate nominated by two political parties appears in the general election on the ballot lines of both parties, and votes cast for that candidate on either line are aggregated in determining support relative to rivals. MPN was once widely practiced in the United States, but was banned in most states after the defeat of the Populists in the mid-1890s.[2] The practice survives today in only a few states, most prominently in New York.[3] MPN is

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1. R6 refers to Docket Entry No. 6 in the record on appeal, R1, R2 etc. to Docket Entries Nos. 1, 2, etc.

2. Peter C. Argersinger, *A Place on the Ballot; Fusion Politics and Antifusion Law*, 85 American Historical Review 287 (1980).

3. Multiple nomination by political parties is permitted, either by explicit authorizing statute or the absence of a ban, in Arkansas (no ban); Connecticut (Conn. Gen. Stat. § 9-453t [1991]; Delaware (no ban); Mississippi (no ban); New York (N.Y. Election Law §§ 6-120, 146 [McKinney 1978 & Supp. 1992]); South Dakota (no ban); Utah (no ban); and Vermont, where MPN is permitted

(Cont'd)

favorable to minor parties; its widespread ban was a deliberate, and largely successful, effort to reduce the influence of minor parties in the United States.[4]

(Cont'd)
by minor party committees but not major parties in primary (Vt. Stat. Ann. tit. 17, § 2474 [Supp. 1991]).

States that explicitly ban MPN include Alabama (Ala. Code § 17-8-2 [1975]); Georgia (Ga. Code Ann. § 21-2-137 [Michie 1987]); Hawaii (Haw. Rev. Stat. § 12-3([c] [1988]); Illinois (Ill. Ann. Stat. ch. 46, ¶ 7-10[2] [Smith Hurd 1991]); Indiana (Ind. Code Ann. §§ 3-8-7-19, -20 [Burns Supp. 1991]); Iowa (Iowa Code Ann. §§ 49.37, .38 [West 1991]); Kansas (Kan. Stat. Ann. § 25-306 [1986]); Kentucky (Ky. Rev. Stat. Ann. § 118.405 [Michie/Bobbs-Merrill Supp. 1990]); Michigan (Mich. Comp. Laws Ann. § 168.692 [West 1989]); Minnesota (Minn. Stat. Ann. § 202A.23 [West Supp. 1992]); Missouri (Mo. Ann. Stat. § 115.351 [Vernon 1980]); Montana (Mont. Code Ann. § 13-10-303 [1989]); Nebraska (Neb. Rev. Stat. § 32-516 [1943]); New Jersey (N.J. Stat. Ann. § 19:13-8 [West 1989]); North Dakota (N.D. Cent. Code § 16.1-12-06 [1991]); Pennsylvania, except for certain municipal elections (Pa. Stat. Ann. tit. 25, § 2870 [Supp. 1991]); Rhode Island (R.I. Gen. Laws § 17-15-7 [1988]); Tennessee (Tenn. Code Ann. § 2-5-101[f][1] [Supp. 1991]); Virginia (Va. Code Ann. § 24.1-111 [Michie 1950]); and Washington (Wash. Rev. Code Ann. § 29.30.101 [West Supp. 1992]). This list includes states in which MPN ballots are banned, but write-ins are permitted.

Other states effectively prohibit MPN without directly banning it, including Alaska (Alaska Stat. §§ 15.25.030, .180 [1988]); Arizona (Ariz. Rev. Stat. Ann. §§ 16-311, -341 [1984]); Colorado (Colo. Rev. Stat. Ann. §§ 1-4-101, -102, -601, -603, -801[1][i] [West 1989]); District of Columbia (D.C. Code Ann. § 1-1312[i]-[j] [1981]); Florida (Fla. Stat. Ch. 99.021[1][b] [1991]); Idaho (Idaho Code § 34-704 [1981]); Louisiana (La. Rev. Stat. Ann. 18:463, 465 [West 1979 & Supp. 1992]); Maryland (Md. Election Code Ann. §§ 4A-1, 16-5[d] [1990]); Massachusetts (Mass. Ann. Laws ch. 53, §§ 48, 61 [Law. Co-op Supp. 1991]); Nevada (Nev. Rev. Stat. § 293.177 [1990]); New Hampshire (N.H. Rev. Stat. Ann. § 655.14 [1986]); North Carolina (N.C. Gen. Stat. § 163-106 [1991]); Ohio Rev. Code Ann. § 3513.05 [Anderson 1991 Supp.]); Oklahoma (Okla. Stat. Ann. tit. 26 § 5-105 [West 1991]); and Wyoming (Wyo. Stat. §§ 22-5-204 [1977]).

4. *Argersinger, supra* n. 2, at 288 ff.; R14, Reply Ex. C, ¶¶ 9-10, 13.

This case arose in July 1990, when Labor Farm sought to nominate, with his consent (R12, Affidavit, ¶ 4), Douglas La Follette as a Labor Farm candidate for the office of Wisconsin Secretary of State (R6, Ex. B). At the time, La Follette was already seeking the Democratic Party nomination to that office. Acting pursuant to Wisconsin's MPN-ban, the State Board of Elections ("the State") refused to place La Follette on Labor Farm's primary ballot, triggering the present challenge[5] (R6, Ex. C).

B. History of the Litigation

Labor Farm brought this action in district court on July 13, 1990.[6] It sued the State for injunctive and declaratory relief, arguing that the Wisconsin MPN-ban violated the First and Fourteenth Amendments by impermissibly burdening its rights (1) to freely choose its nominees and (2) to compete, as a minor

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5. The Wisconsin ban states:

> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.

Wis. Stat. Ann. § 8.15(7) (West 1986). Section 8.03(1) provides:

> The name of any candidate who is nominated to the same office by more than one party or primary . . . shall appear under the party first nominating him or her or under the office to which he or she was first nominated.

Since La Follette's nomination in the Democratic primary was filed before Labor Farm's, the Board placed La Follette on the Democratic party's ballot line, and excluded him from Labor Farm's line (R6, Ex. C).

6. Jurisdiction in the district court was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

party, in an electoral process not disproportionately burdensome to minor parties.

The first prong of Labor Farm's argument was based on that line of cases, culminating in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) and *Eu v. San Franciso County Democratic Central Committee*, 489 U.S. 214 (1989), holding that political parties have fundamental rights under the First Amendment to regulate their own affairs — including the right to select candidates to represent them in elections — free of interference by the state. Labor Farm argued that the MPN-ban infringes this right on its face. By barring the party from nominating individuals already nominated by, or seeking the nomination of, another party, it burdens a political party's basic right to choose the standard bearer of its choice.

The second prong of Labor Farm's argument was based on that line of cases, culminating in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), holding that state electoral laws which impose a disproportionate burden on new or minor parties infringe fundamental First Amendment rights. America has a "winner take all" electoral system, in which office-seekers are typically elected by a simple plurality of votes cast in single member election districts. In such a system, minor parties, which are typically unable to win elections on their own, suffer from a "wasted vote syndrome". Many who support a minor party's ideology and program decline to demonstrate that support at the polls, since they are reluctant to "waste" votes on candidates with no serious chance of winning. MPN mitigates this syndrome by permitting minor parties to join electoral coalitions with other parties behind candidates with a realistic chance of success. It gives minor party supporters an opportunity to express their support without "wasting" their votes. The undisputed result is that minor parties do better under MPN than under an MPN-ban (R14, Reply Ex. C, ¶¶ 5-6, 13). Labor Farm argued, on the basis of these facts,

that the Wisconsin MPN-ban is just the sort of state law, facially neutral but in fact disproportionately burdensome to minor parties, that was held unconstitutional under *Anderson*.

The district court denied Labor Farm's request for an injunction and dismissed the lawsuit. The court found that the MPN-ban imposed no burden on Labor Farm's First Amendment freedoms (App. B at 17a-18a) and was in any case justified by the State's interests in avoiding confusion and assuring that the "winner is the winner," *i.e.*, that the winner of any election is the choice of a majority or at least plurality of those participating in that election (*Id.* at 18a).

Labor Farm appealed this decision and sought injunctive relief pending appeal. The request for an injunction was denied, and on December 3, 1991, the court of appeals affirmed.

Writing for the majority, Judge Kanne, joined by Judge Manion, first found that the MPN-ban imposed no burden on Labor Farm's First Amendment freedoms because the party remained free to nominate candidates other than its preferred one, and free to support its preferred candidate in the primary of another party [7] (App. A at 4a, 5a). Without mentioning that La Follette had *consented* to be Labor Farm's nominee, the majority declared that the MPN-ban did not infringe a party's right to "nominate any candidate that the party can convince to be *its* candidate." (*Id.* at 4a).

The majority held further that Wisconsin's MPN-ban was justified by the State's interests in assuring that "the winner is

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7. In Wisconsin, split-ticket voting is not permitted in party primaries. Wis. Stat. Ann. § 5.62(5) (West 1986). A voter's decision to support La Follette on the Democratic Party's primary line would thus entail not voting for any Labor Farm candidates.

the winner," in avoiding voter confusion, and in preserving the integrity of the election process through avoidance of party raiding and the involuntary nomination of candidates by extremists (*Id.* at 5a-7a).

In a separate concurrence, Senior Judge Fairchild took issue with the majority's reasoning. Apparently recognizing a burden on Labor Farm's First Amendment rights (*Id.* at 8a-9a), he rejected, as inadequate, irrelevant, or overbroad, all the state interests relied on by the majority to justify the ban (*Id.* at 9a-10a). Judge Fairchild nevertheless argued that the ban should be upheld, on the grounds that it might be thought to contribute to the distinctness of political party platforms and ideologies, and that such distinctness might be considered one aspect of a stable political system (*Id.* at 10a-12a).

On December 26, 1991, Labor Farm filed a suggestion for a rehearing *en banc*. During the pendency of that suggestion, this Court decided *Norman v. Reed*, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). Labor Farm brought the *Norman* decision to the attention of the court of appeals and sought leave to file a supplemental brief on its relevance to this case. Leave was denied, and on February 11, 1992, the majority of the court denied rehearing without opinion. Judge Ripple, joined by Judges Posner and Easterbrook, filed a written dissent (App. C).

Judge Ripple's dissent sharply criticized the panel's treatment of this case, observing that it "deviates in important respects from the methodology and analysis employed by the Supreme Court." (App. C at 22a). The dissent found that the Wisconsin ban infringes core freedoms, rejected as inadequate the state interests offered in the ban's defense, and concluded that Wisconsin has no "right to frustrate freely made political alliances simply to protect artificially the political status quo." (App. C at 23a-24a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF GREAT PUBLIC IMPORTANCE.

This case presents two constitutional issues of great public importance. Both, given the extent of MPN-bans in the United States, are of national scope.

The first issue is whether a state can legitimately forbid a political party from nominating the candidate of its choice. No right is more important to the associational activities of political parties than their right to select the candidates who they believe best advance their political views. Wisconsin's MPN-ban tells Labor Farm whom it can nominate. It is difficult to imagine a more intrusive restriction on a political party's associational rights.

The second issue is whether the existing major parties, exercising their *de facto* monopoly on state legislative power, may erect artificial barriers to competition from new and minor parties. The historical record makes clear that MPN-bans weigh disproportionately on minor parties and were enacted with the explicit purpose of limiting competition from them. If, as here, the electoral alliances that MPN permits are freely made, the *only* rationale for restricting them is "to protect . . . the political status quo." (App. C at 24a).

MPN-bans, whose first enactment substantially predates this Court's present recognition of the constitutional importance of the rights of political parties, have never been reviewed by this Court. This case presents the Court with an opportunity to review this important feature of American electoral law in light of present constitutional understandings.

II.

THE PANEL FAILED TO EVALUATE THIS CASE BY THE STANDARDS REQUIRED BY THIS COURT.

This Court has declared that political party challenges to state laws restricting party autonomy or burdening the growth of minor parties require exacting review. *Eu*, 489 U.S. at 222; *Anderson*, 460 U.S. at 789. In determining if a challenged law imposes a burden on fundamental party rights or a significant restriction on minor parties, an "indepth examination of the associational rights at issue" is demanded (App. C at 22a), and a statute found to impose such a burden can survive challenge only if the court finds it to be "narrowly drawn to advance a state interest of compelling importance." *Norman*, 112 S. Ct. at 705 . The panel fails to conduct either part of this searching inquiry (App. C at 22a).

First, the majority's finding that Wisconsin's MPN-ban places *no* burden on labor farm's associative freedoms is perfunctory, and ignores important precedents of this Court.

This Court has explicitly recognized that a political party's right to nominate a candidate of its choice is a core right, interference with which "unquestionably implicates an associational freedom." *Eu*, 489 U.S. at 224; *Tashjian*, 479 U.S. at 214-6. The dissent correctly observes that the "ability to choose the same person as another party is an important aspect of that right" (App. C at 22a). On its face, Wisconsin's MPN-ban burdens this fundamental right.

This Court has also recognized that a restriction on electoral activity that "falls unequally on new or small political parties . . . impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. at

793-4. It is beyond controversy that the MPN-ban hurts minor parties more than major ones, and hurts them severely. Under *Anderson* and *Norman*, it thus imposes a *substantial* burden on First Amendment freedoms.[8]

Second, given the magnitude of these burdens, the interests asserted by the panel do not justify the ban. They are manifestly not compelling state interests narrowly advanced by the challenged statute.

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8. The majority appears to regard the rights of minor parties, including their right to advance their interests in the electoral system, as themselves illegitimate. Such an attitude may explain the majority's speculation that Labor Farm's "true motivation" might be to maintain its ballot status, as if such ambition were itself illegitimate (App. A at 5a, n. 3). And it may explain the majority's characterization of inter-party alliances initiated by minor parties as efforts to "*leech* onto" those more powerful than themselves (*Id.* at 5a). Judge Ripple squarely refutes this characterization in the dissent:

> When a party nominates a candidate also nominated by a major party, it does not necessarily "leech onto" . . . the larger party for support. Rather, it may — and often does — offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party . . . Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor. In short, permitting people to vote for a candidate on one party line rather than another increases the opportunity of both voter and party to be heard and for workable political alliances to be formed.

(App. C at 22a-23a).

The majority asserts that the MPN-ban is necessary to ensure that "the winner of an election is the choice of a majority or at least a plurality of the voters" (App. A at 5a-6a). This interest is not even rationally related to the MPN-ban. Under MPN, as under an MPN-ban, the winner of a party's primary is the candidate with the most votes in that primary, and the winner of a general election is the candidate with the most votes in that election. Moreover, the inter-party alliances permitted by MPN make it more likely, not less, that winning candidates will enjoy the support of a clear majority of voters.

The majority asserts that the MPN-ban is necessary to avoid voter confusion (*Id.* at 6a). But this Court has shown great reluctance to credit fears of voter confusion as a rationale for limiting fundamental rights. *Norman,* 112 S. Ct. at 706; *Tashjian,* 479 U.S. at 220; *Anderson,* 460 U.S. at 798. Moreover, there is no evidence that MPN produces confusion (R14, Reply Ex. C ¶¶ 11, 13). Indeed, as the dissent notes, MPN improves the quality of information available to voters by signalling more precisely the diverse sources of a candidate's support (App. C at 22a-23a).

The majority asserts that the MPN-ban is necessary to prevent an "unlimited" number of minor parties (App. A at 6a). This concern is baseless. Neither the widespread practice of MPN in the late 19th century, nor its current practice, has ever led to a large number of minor parties on the ballot. Moreover, the legal status of MPN is irrelevant to state rules on ballot access. Such rules, not MPN, are what effectively determine the number of parties allowed on the ballot.

The majority asserts that the MPN-ban is necessary to avoid party "raiding," or mischievous entry to a party's primary by voters supportive of another party. *(Id.)* This interest is not even

rationally related to the MPN-ban. Wisconsin primaries are "open" to all registered voters, irrespective of their party affiliation, and provide no deterrent to party raiding (*Id.* at 11a). This situation would not be improved, or worsened, by eliminating the MPN-ban.

The majority asserts that the MPN-ban is necessary to avoid the involuntary nomination of candidates by extremist parties (*Id.* at 6a). This concern is irrelevant to the instant case, where the candidate *consented* to joint nomination, and it is not narrowly advanced by the challenged statute. The "simple expedient" of a requirement of candidate consent to any nomination would fully meet the concern in a way less burdensome than a blanket MPN-ban. *Norman,* 112 S. Ct. at 706.

Judge Fairchild asserts that the MPN-ban should be upheld because it may contribute to the distinctness of parties, which in turn may contribute to political stability (App. at 10a-11a). The authority cited for this argument, however, is inapposite, and the argument itself contravenes the First Amendment.

Judge Fairchild rests his concurrence on *Storer v. Brown,* 404 U.S. 724 (1974); *Rosario v. Rockefeller,* 410 U.S. 752 (1973); and *Lippitt v. Cipollone,* 404 U.S. 1032 (1972). (*Id.* at 11a-12a). These three cases, however, involve voter or independent candidate challenges to state electoral laws protective of political parties. They do not involve, as this case does, a party's own assertion of its right to engage in partisan activity free of state interference.[9] They are therefore inapposite.

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9. The importance of this distinction is stressed in *Tashjian:*

> It is this element of potential interference with the rights of

(Cont'd)

Judge Fairchild's view that states may legitimately seek to ensure the distinctness of party ideologies and platforms conflicts with fundamental First Amendment values. States have no business dictating the content of political party platforms and ideologies; the use of an MPN-ban to *force* distinctness is not a legitimate exercise of state power. Moreover, the goal sought by Judge Fairchild may be achieved more simply, and with less burden to fundamental freedoms, by eliminating the MPN-ban. As the dissent below rightly suggests, the only real purpose served by an MPN-ban is to "protect . . . the political status quo" (App. C. at 24a) by restraining free and fair party competition. Such competition is the best guarantor of the party distinctness Judge Fairchild seeks. It can be furthered by eliminating the artificial restraints on party competition imposed by the MPN-ban.

(Cont'd)

> the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See *Rosario v. Rockefeller* . . . Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules . . . These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers.

479 U.S. 208, at 215, n. 6 (other citations omitted).

CONCLUSION

For these reasons, petitioners' request for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 90-2781, 90-2884

GEORGE SWAMP, JOHN HENDRICK and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Plaintiffs-Appellants,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, and PETER R. DOHR, THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 90 C 0504
John C. Shabaz, Judge.

ARGUED JANUARY 25, 1991—DECIDED DECEMBER 3, 1991

Before MANION and KANNE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

KANNE, *Circuit Judge*. George Swamp, John Hendrick and the political party of which they are members, the Labor-Farm Party/Partido Laborista-Agario (collectively the "Labor-Farm

Party"), challenge the constitutionality of Wisconsin's statutory ban on "multiple party nominations," which prohibits a candidate from being nominated by more than one party for the same office in the same election.[1] Members of the Labor-Farm Party sought to place the name of Douglas La Follette on that Party's primary ballot for Secretary of State; however, nomination papers had previously been filed to place his name on the primary ballot of the Democratic Party. The Labor-Farm Party argues that the ban unconstitutionally infringes on its rights of free speech and association guaranteed by the First and Fourteenth Amendments of the United States Constitution.[2] The district court denied the Party's motion for injunctive relief and motion for summary judgment, and dismissed the action. We affirm.

The Supreme Court recently reiterated the framework for assessing the constitutionality of a state election law in *Eu v. San*

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1. Wisconsin Statute § 8.15(7) provides:

> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.

Wisconsin Statute § 8.03(1) provides further:

> The name of any candidate who is nominated to the same office by more than one party . . . shall appear under the party first nominating him or her . . . .

2. Although the relevant elections have occurred, the action is not moot because this issue is "capable of repetition, yet evading review." *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 93 S. Ct. 1245, 1249 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 1494 (1969).

Appendix A

Francisco County Democratic Central Committee:

> A State's broad power to regulate the time, place and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. [208], 217, 107 S. Ct. [544], 550 [(1986)]. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.

489 U.S. 214, 222, 109 S. Ct. 1013, 1019-20 (1989) (other citations omitted).

It is well settled that partisan political organizations enjoy the freedom of association protected by the First and Fourteenth Amendments. *Eu*, 489 U.S. at 224, 109 S. Ct. at 1020. The Labor-Farm Party contends that the multiple party nomination ban burdens its associational rights in two ways.

First, the Party argues that the ban infringes upon party autonomy by restricting its ability to select candidates for electoral office. Although the freedom of association encompasses a political party's decisions about the identity of, and the process for electing, its leaders, *Id.*, 489 U.S. at 229, 109 S. Ct. at 1024, a party's associational rights are not absolute and are necessarily subject

to qualification if elections are to be run fairly and effectively. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533, 536 (1986). The ban prohibits a candidate from running in more than one party primary for the same office in the same election. Therefore, the right of party members to associate is only limited to the extent that they are prevented from placing on their primary ballot the name of a candidate who has previously been placed on the primary ballot of another party. The ban does not substantially burden the "availability of political opportunity," *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 1320 (1974), because a party may nominate any candidate that the party can convince to be *its* candidate. Here, La Follette filed his own nomination papers as a candidate for Secretary of State in the Democratic primary and submitted an affidavit stating that he is a "life-long Democrat." The Labor-Farm Party has no right to associate with a candidate who has chosen to associate with another party.

Second, the Labor-Farm Party maintains that the ban is disproportionately burdensome on minority parties and limits competition. A burden that falls unequally on new or small political parties discriminates against those parties and voters whose political preferences lie outside the existing political parties. *Anderson v. Celebrezze*, 460 U.S. 780, 794-95, 103 S. Ct. 1564, 1572 (1983). Accordingly, the Labor-Farm Party asserts that, unlike major parties, minority parties cannot win state-wide elections on their own, without going into coalition with other parties. Therefore, the Party concludes that the ban has a disproportionate impact on the electoral success of third parties and burdens their efforts to compete, publicize their views, and widen their popular base of support. We disagree.

The Labor-Farm Party acknowledges that there is no

competition among parties if parties choose the same candidate for an office, but asserts that by choosing a candidate already nominated by another party a minority party can gain strength overall, irrespective of any particular campaign. This argument cuts against the Party's position. Allowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to chose their own candidates promotes competition.[3] *Cf. Hall v. Simcox*, 766 F.2d 1171, 1176 (7th Cir.) (finding that a restriction on ballot access ratifies competition by keeping off the ballot those parties so lacking in electoral appeal that they contribute little to political diversity), *cert. denied*, 474 U.S. 1006, 106 S. Ct. 528 (1985).

The ban also does not burden a minority party's efforts to publicize its views or widen its base of support; it merely restricts a party from nominating another party's candidate. A party can support a candidate previously nominated by another party if that candidate best represents its views or the party is free to choose any other candidate to express its views.

Even if the ban burdens the associational rights of political parties, it is justified by compelling state interests. The district court recognized the legitimate interest of the State in assuring that the winner of an election is the choice of a majority or at least a plurality of the voters. *Bullock v. Carter*, 405 U.S. 134, 145, 92 S. Ct. 849, 857 (1972). If a candidate appears on the

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3. The true motivation of the Labor-Farm Party in bringing this action may be to retain its "ballot status," or ability to run candidates in state elections on a specifically designated party line. To retain this status, a party must earn a certain percentage of the vote in each election. By running a popular Democratic Party candidate, the Labor-Farm Policy has an opportunity to garner this percentage.

primary ballots of more than one party but is defeated in all the primaries in which he runs, his name will not be on the general ballot even though he may have received the majority of votes in the aggregate.

Avoiding voter confusion is also a compelling state interest. *Bullock*, 405 U.S. at 145, 92 S. Ct. at 857. By limiting the names on the ballot to those who have won the primaries, voters will be presented "with understandable choices and the winner in the general election with sufficient support to govern effectively." *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 1281 (1974). Without a ban on multiple party nominations, an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters. Because the candidate would be presented by the different parties as representing the particular views and preferences of each party, it would be difficult for voters to distinguish between the parties.

Moreover, the State has a compelling interest in preserving the integrity of its election process. *Eu*, 489 U.S. at 231, 109 S. Ct. at 1024; *Rosario v. Rockefeller*, 410 U.S. 752, 761, 93 S. Ct. 1245, 1251 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 345, 92 S. Ct. 995, 1004 (1972); *Bullock*, 405 U.S. at 145, 92 S. Ct. at 857. Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Eu*, 489 U.S. at 231, 109 S. Ct. at 1024 (citing *Storer*, 415 U.S. at 730, 94 S. Ct. at 1279).

Wisconsin has a legitimate interest in seeking to curtail "raiding" whereby voters who are sympathetic with one party vote on the ballot of another party so as to influence or determine the results of that other party's primary. *Tashjian v. Republican*

Party of Connecticut, 479 U.S 208, 219, 107 S. Ct. 544, 551 (1986); *Rosario*, 410 U.S. at 760, 93 S. Ct. at 1251; *Bullock*, 405 U.S. at 145, 92 S. Ct. at 857 ("[s]tate has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies"). For example, if multiple party nominations were permitted, the National Socialist Party could nominate a candidate who has been nominated by a major party and is adverse to the National Socialist Party's interests in order to encourage voters opposing the National Socialist Party to defeat the candidate.

The ban also limits involuntary fusion of political parties. Maintaining a stable political system is a compelling state interest. *Eu*, 489 U.S. at 226, 109 S. Ct. at 1022. States may regulate elections to ensure that "some sort of order . . . accompan[ies] the democratic process." *Storer*, 415 U.S. at 730, 94 S. Ct. at 1279.

Wisconsin's ban on multiple party nominations does not burden the associational rights of political parties and is justified by compelling state interests. The district court properly denied the Labor-Farm Party's motion for injunctive relief and motion for summary judgment, and dismissed the action.

The judgment of the district court is AFFIRMED.

Appendix A

FAIRCHILD, *Senior Circuit Judge*, concurring.

"Freedom of association means . . . that a political party has a right . . . to select a 'standard bearer who best represents the party's ideologies and preferences.' " *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (citations omitted). If a law "burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest." Id. at 222 (citations omitted).

In applying the *Eu* formula, the first question is whether the prohibition against cross-filing burdens plaintiff's rights. The majority opinion intimates that the burden is small because the only persons plaintiffs are prevented from placing on their primary ballot are persons previously placed on the primary ballot of another party. Apparently deeming the burden minimal, the majority opinion ultimately concludes there is no burden on associational rights.

Perhaps there is room for a balancing process, and for dismissing the burden here as insignificant. The Supreme Court has described the applicable analytical process as follows:

> [A Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and

> strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (citations omitted).

The second step under *Eu* is to identify the state interest served and decide whether it is "compelling." Identifying a state interest important enough to be "compelling" presents difficulties. Two Justices of the Supreme Court have expressed discomfort with the "compelling state interest" test. *Eu*, 489 U.S. at 233-34 (Stevens, J., concurring) (quoting *Illinois Bd. of Elections v. Socialists Workers' Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)). Not all states consider that a prohibition against cross-filing serves a compelling interest. Several states including New York, Massachusetts, and Pennsylvania,[1] allow multiple party nominations.

Assuming the prohibition against cross-filing does burden associational rights, the majority opinion then concludes that the burden is justified by compelling state interests. Three "compelling" state interests are identified: (1) avoiding voter confusion, (2) preserving the integrity of the election process, and (3) maintaining a stable political system. With all respect, I am

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1. *See, e.g.*, Conn. Gen. Stat. § 9-453t (1990); Mass. Gen. L. ch. 54 § 41 (1991); N.H. Rev. Stat. Ann. § 659:68 (1990); N.Y. Elec. Law § 6-146 (McKinney 1991); 25 Pa. Cons. Stat. § 3010(f) (1989); Utah Code Ann. § 20-5-11(2) (1991).

unable to agree that state interests (1) and (2) are advanced by the prohibition against cross-filing. I will reach state interest (3) at a later stage.

The majority opinion also identifies two state interests characterized as "legitimate": (1) assuring that the winner of an election is the choice of a majority, or at least a plurality of the voters, and (2) seeking to curtail voters sympathetic to one party voting in the primary of another party. Again, I am unable to agree that prohibition against cross-filing does anything to advance either of these interests, even if labeled "compelling." The problem suggested by the majority opinion, that one party could damage the candidate of another party by nominating him, could be prevented by a much more narrow provision requiring an acceptance by the candidate before his name could be placed on the primary ballot.

The majority's third "compelling" interest is maintaining a stable political system. I would describe the interest served by prohibiting cross-filing more narrowly. It is the interest in maintaining the distinct identity of parties. People may rationally believe that in a party system, each party should have a distinct ideology, platform, and the like, and it seems arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party. This may be true as a general proposition even though there may be individual instances where two parties may have the same position on one or more issues. In the present case, where the candidate seeks the non-policy-making office of secretary of state, his being the candidate of two parties could do little real damage to the distinct identity of principles of the parties.

It happens that Wisconsin (other than prohibiting cross-filing)

seems not to place a high value on maintaining the distinct identity of parties. It does not require voters to register their political affiliation. When any voter enters the booth at a partisan primary election, Wisconsin gives the voter the complete freedom, in privacy, to choose the party in whose primary he will vote that day. A person is not prohibited from being a candidate in the primary of one party even if he has voted in, or been the candidate of, another party at an earlier election. Nevertheless, if one believes it important that parties should be so distinct in their principles and ideologies that one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election, the prohibition against cross-filing does advance that interest.

In any event, maintaining the distinct identity of parties can be viewed as one facet of maintaining a stable political system. The Supreme Court has recognized a State's interest in the stability of its political system as "compelling." *Storer v. Brown*, 415 U.S. 724, 736 (1974). The California statute upheld in *Storer* forbade "ballot position to an independent candidate for elective public office . . . if he had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election." *Id.* at 726. The Court relied on *Rosario v. Rockefeller*, 410 U.S. 752 (1973) upholding a provision "that to vote in a party primary the voter must have registered as a party member 30 days prior to the previous general election, a date eight months prior to the presidential primary and 11 months prior to the nonpresidential primary." *Storer*, 415 U.S. at 731. The Court also set forth California's decision to forbid cross-filing, reached in 1959, after having permitted it for many years. *Id.* at 734. It also cited *Lippett v. Cipollone*, 404 U.S. 1032 (1972). *Id.* at 736. There the Court affirmed, without opinion, a district court decision upholding a statute which prohibited being a

candidate for nomination at a party primary if the person voted at the primary of a different party within the preceding four years. The measures mentioned in *Storer*, *Rosario*, and *Lippett* all serve the purpose of maintaining distinct party identity. *Storer* found that to be a compelling state interest, though under the rubric of stability of the political system.

I am persuaded that *Storer* requires affirmance in this case, and therefore concur.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for The Seventh Circuit

APPENDIX B — CORRECTED MEMORANDUM OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WISCONSIN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

90-C-504-S

GEORGE SWAMP, JOHN HENDRICK and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Plaintiffs,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, and PETER R. DOHR, THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Defendants.

CORRECTED MEMORANDUM

On August 10, 1990, plaintiffs' motion for emergency injunctive relief was denied and judgment was entered in favor of the defendants, dismissing plaintiffs' complaint and all claims contained therein. On August 9, 1990 the court stated its findings of fact and conclusions of law from the bench upon the completion of the hearing held for the determination of the plaintiffs' motion for emergency injunctive relief. At that time the court reserved the right to file a written supplementary memorandum. This is

that written memorandum.

The plaintiffs George Swamp, John Hendrick and Labor-Farm Party/Partido Laborista-Agrario, request declaratory relief determining that Wisconsin Statute § 8.15(7) and Wisconsin Statute § 8.03(1) violate their constitutional rights: specifically, the right of association guaranteed by the First Amendment of the United States Constitution. The statutes at issue provide in pertinent part as follows:

> Wis. Stat. § 8.15(7):
>
> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.
>
> Wis. Stat. § 8.03:
>
> The name of any person nominated to the same office by more than one party or primary or nominated for more than one partisan or state nonpartisan office shall appear under the party first nominating him or her or under the office to which he or she was first nominated.

The decisions of the United States Supreme Court are contrary to plaintiffs' position which recognizes that a state has a legitimate interest in regulating the number of candidates on the ballot. *Bullock v. Carter*, 405 U.S. 134, 145 (1971). The court in Bullock held:

> [T]he State understandably and properly seeks to

> prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of run-off elections.

The Supreme Court further articulated this position in *Rosario v. Rockefeller,* 410 U.S. 752 (1972). The *Rosario* Court stated: "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." *Id.* at 761. Finally, in *Storer v. Brown,* 415 U.S. 724, 734 (1973), the Court restated its position previously espoused in *Bullock:*

> After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections. Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959. A candidate in one party primary may not now run in that of another . . . .

Here, the plaintiffs acknowledge these decisions. Nevertheless, they argue that *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986) is controlling. The Supreme Court in *Tashijian* held:

> The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment

> interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Id. at 224. The court distinguishes *Tashijian* from *Storer* and *Rosario* where the state action was not undertaken to prevent the disruption of political parties from the outside, but rather to prevent the parties from taking internal steps which would adversely effect their own process for the selection of candidates. Finally, it is appropriate to review *Eu v. San Francisco County Democratic Central Committee,* 109 S.Ct. 1013 (1989) where the United States Supreme Court set forth the parameters used to assess the constitutionality of a state election law. The court stated:

> A state's broad power to regulate the time, place and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.' To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.
>
> * * *
>
> Barring political parties from endorsing and opposing candidates not only burdens their

> freedom of speech but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to 'identify the people who constitute the association,' and to select a 'standard bearer who best represents the party's ideologies and preferences.'

Id. at 1019-1021, (citations omitted).

Pursuant to the arguments advanced by the parties and applying the applicable law noted herein, this Court upheld the action of the defendants which withheld the name of Douglas J. La Follette from the Labor Farm Party ballot because he had previously qualified for nomination on the ballot of the Democratic Party. The plaintiffs' inability to place Douglas J. La Follette on the Labor Farm primary ballot for September of 1990 did not violate their First Amendment rights.

In addition, the court received an affidavit from Douglas J. La Follette advising the Court that he has been a life-long member of the Democratic party and continues and will continue to pursue the Democratic principles for the remainder of his life. Examining all of the circumstances presented, including the affidavit of Douglas J. La Follette, the plaintiffs and the Labor Farm Party have not been deprived of the right to select a standard bearer who best represents the ideologies and preferences of the Labor Farm Party.

Furthermore, they are not deprived from pursuing a standard bearer of their choice who represents the party's ideologies and preferences pursuant to appropriate write-in procedures. Even were it determined that the statutes which plaintiffs seek to have declared unconstitutional burden their rights to free speech and free association, they can survive where they serve a compelling governmental interest. *Bullock* refers to the need for stable government and an election process that avoids voter confusion and undue influence, suggesting that the maintenance of a stable political system is unquestionably a compelling state interest. There is no question that placing a candidate on more than one ballot will cause voter confusion, but more than this *Bullock* recognizes the legitimate interest of a state to assure that the winner is a choice of a majority, or at least a strong plurality. Concisely stated, a candidate on two partisan primary ballots can receive the greatest number of votes but can nevertheless be denied a place on the general election ballot where that candidate finishes second to each of the front runners on the two primary ballots where he or she was named.

In conclusion, this Court is of the opinion that Wisconsin Statutes § 8.15(7) and § 8.03(1) do not burden plaintiffs' rights to free speech and free association, and even if that were the case the defendants have offered compelling governmental interests to survive constitutional scrutiny.

This represents the supplement to which this Court referred in its statement from the bench on August 9, 1990, and in its order of August 10, 1990 denying plaintiffs' request for a preliminary injunction and granting judgment in favor of the defendants dismissing plaintiffs' complaint.

Entered this 27th day of August, 1990.

Appendix B

THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 11, 1992

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge**

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* Senior Circuit Judge Fairchild did not participate in the consideration of the suggestion for rehearing *en banc*.

Appendix C

Nos. 90-2781 & 90-2884

GEORGE SWAMP, JOHN HENDRICK and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Plaintiffs-Appellants,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, and PETER R. DOHR, THOMAS P. GODAR, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 90 C 504

John C. Shabaz, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 26, 1991, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. Judges Posner, Easterbrook and Ripple voted to grant rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

Appendix C

IT IS THEREFORE ORDERED that the request for rehearing *en banc* is hereby, DENIED; IT IS FURTHER ORDERED that the petition for rehearing is hereby DENIED.

RIPPLE, *Circuit Judge,* with whom POSNER and EASTERBROOK, *Circuit Judges,* join, dissenting from the denial of rehearing en banc. The panel opinion, while it articulates established standards, actually deviates in important respects from the methodology and analysis employed by the Supreme Court in *Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214 (1989), and *Norman v. Reed,* No. 90-1126, slip op. (U.S. January 14, 1992), (The panel did not have the benefit of the latter).

First, while acknowledging that political parties enjoy associational rights, *Swamp v. Kennedy,* Nos. 90-2781 & 90-2884, slip op. at 3 (7th Cir. Dec. 3, 1991), the panel concludes — categorically — that the Wisconsin ban on multiparty nominations does not burden those rights, *id.* at 6. Certainly, a more indepth examination of the associational rights at issue is required by established case law. *See Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983) (court must examine character and magnitude of the rights at stake). The Supreme Court has recognized that the right of a party to nominate a candidate of its choice is a vital aspect of the party's role in our political structure. *See Eu,* 489 U.S. at 224. The ability to choose the same person as another party is an important aspect of that right. It allows a party to form significant political alliances. When a minor party nominates a candidate also nominated by a major party, it does not necessarily "leech onto," *Swamp,* slip op. at 4, the larger party for support. Rather, it may — and often does — offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party

prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party. If a majority of the members of both major parties believe the same person is the best candidate, that alliance is of major significance in our political life. Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor. In short, permitting people to vote for a candidate on one party line rather than another increases the opportunity of both voter and party to be heard and for workable political alliances to be formed.

Second, a state may assert important countervailing state interests. However, those state interests must be *real* ones and, under the prevailing analysis of *Norman,* must be sufficiently weighty to justify the restriction. *Norman,* slip op. at 8. Any severe restriction must be narrowly drawn to advance a state interest of compelling importance. *Id.* While there is a state interest in avoiding "voter confusion," *Swamp,* slip op. at 5, there are less restrictive alternatives to achieving that goal than by decreeing that, no matter how many members of a particular party want a particular candidate, he or she may not be their candidate simply because members of another party believe that the candidate also would best deliver the principles of their platform.

States also have an interest in the integrity of the election process, but the panel does not suggest any particular evil that necessitates this broad and severe regulation. *Id.* at 6. As the concurring opinion points out, it is not at all clear that Wisconsin, which permits cross-over votes, has an important interest in preventing the sort of "raiding" that the panel foresees. *Swamp,* slip op. at 9 (Fairchild, J., concurring). "Involuntary fusion," *Swamp,* slip op. at 6, of political parties sounds ominous.

However, if two parties end up with the same candidate because the voters in each party voted for that result, the resulting alliance can hardly be termed "involuntary." A significant part of the electorate has expressed its desire for a political alliance. A state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.

APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES

§ 8.15(7) Wis. Stats. states, in pertinent part:

> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.

§ 8.03(1) Wis. Stats. states, in pertinent part:

> The name of any candidate who is nominated to the same office by more than one party or primary . . . shall appear under the party first nominating him or her or under the office to which he or she was first nominated. If the double nomination is simultaneous, the candidate who is nominated, before the deadline for filing nomination papers shall file a written statement with the same person with whom he or she files nomination papers stating the person's party or office preference. If the candidate fails to select the party or office, the filing officer shall place the candidate's name on the ballot under either party or office, but may not permit it to appear more than once. If a candidate is nominated at a primary election for partisan office . . . on a ballot where his or her name appears or by nomination papers filed by the candidate, and is also nominated by write in votes . . . as the candidate of a different party, the candidate does not have a choice, but shall be placed on the ballot for the election under the office and party for which the candidate's name appeared on the primary ballot or for which the

candidate had filed nomination papers.

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.